Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-632

In The

Supreme Court of the United States

October Term, 1988

CONSOLIDATED CAPITAL CORPORATION,
a Florida corporation,
SKYWAY DEVELOPMENT CORPORATION,
a Florida corporation,
and MURRAY WEISS,

Petitioners,

v.

SHEA & GOULD; CONROY, SIMBERG & WILENSKY;
CAREY, DWYER, COLE, ECKHART, MASON & SPRING,
P.A.; LELAND E. STANSELL, JR.;
JOHN H. LEWIS; and MARK A. KAMILAR,

Respondents.

BRIEF FOR RESPONDENT SHEA & GOULD

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STATUTES

28 U.S.C. §1257 ..... *passim*

PRELIMINARY STATEMENT

The appendices to the petition for writ of certiorari shall be cited by use of one letter, e.g., "A".

The appendices to this brief shall be cited by use of two letters, e.g., "AA".

STATEMENT OF THE CASE

On July 1, 1986, the Florida circuit court entered a final judgment "for enforcement of attorneys' charging liens." Appendix C, p. 6a. The judgment awarded respondents attorney's fees for their legal representation of petitioners. Appendix C, p. 5a-18a. It did not, however, draw in question the validity of article V, section 3(b)(3) of the Florida Constitution under the Fourteenth Amendment to the United States Constitution. Appendix C, p. 5a-18a. In fact, the judgment had absolutely nothing to do with article V, section 3(b)(3). Appendix C, p. 5a-18a.

Petitioners appealed that final judgment to the Second District Court of Appeal of Florida, which affirmed without opinion on April 29, 1988. Appendix B, p. 3a-4a. Petitioners then filed motions for rehearing and for rehearing en banc, which the Second District denied without opinion. Appendix G, p. 63a-64a.

Subsequently, on July 1, 1988, petitioners filed in the Second District a motion to stay issuance of mandate, arguing that because petitioners intended to challenge in the Florida Supreme Court and in this Court the validity of article V, section 3(b)(3), the mandate should not issue. Appendix E, p. 31a-39a. The Second District denied that

motion without opinion and issued the mandate. Appendices I, p. 69a; AA.

On July 5, 1988, petitioners filed in the Second District a notice to invoke the discretionary jurisdiction of the Florida Supreme Court. Appendix H, p. 65a-66a. On July 8, 1988, petitioners filed in the Florida Supreme Court a motion to stay issuance of mandate, arguing that article V, section 3(b)(3) violates the equal protection and due process clauses of the Fourteenth Amendment. Appendix D, p. 19a-29a. Because it was "without jurisdiction," however, the Florida Supreme Court dismissed the appeal. Appendix A, p. 1a. It never considered or ruled on the motion to stay issuance of mandate, noting that "[it] is moot as the case will be dismissed." Appendix BB, p. 2a.

There is, therefore, no state court final judgment that draws in question the validity of article V, section 3(b)(3). Indeed, a review of the judgments – the circuit court's final judgment, the Second District's affirmance without opinion, and the Florida Supreme Court's dismissal for lack of jurisdiction – reveals a case about attorney's fee charging liens – and nothing else. Not until petitioners filed their motion to stay issuance of mandate in the Second District was there even a mention of article V, section 3(b)(3). And, that motion did not request a ruling on article V, section 3(b)(3)'s validity, rather a stay of the mandate pending a challenge to that provision in the Florida Supreme Court and in this Court. Appendix E, p. 31a-39a. The constitutional challenge to article V, section 3(b)(3) was first made in petitioners' motion to stay issuance of mandate filed in the Florida Supreme Court. Appendix D, p. 19a-29a. That issue, however, was not

considered or ruled on by the Florida high court, as it had no jurisdiction over the appeal. Appendices A, p. 1a; BB, p. 2a.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to consider the constitutional issue presented in the petition for writ of certiorari. Therefore, the petition should be denied.

ARGUMENT

Because there is no state court final judgment that draws in question the validity of article V, section 3(b)(3) of the Florida Constitution under the Fourteenth Amendment to the United States Constitution, this Court has neither appellate nor certiorari jurisdiction. 28 U.S.C. §§1257(2), (3). *See, e.g., Kennard v. Nebraska*, 22 S.Ct. 879, 881 (1902) (Validity of statute "was not drawn in question" where petitioner had "specially set up or claimed no Federal right, and as the judgment of the supreme court of Nebraska did not impugn the validity of any statute . . . , we find nothing on which to rest a right to review that judgment").

In *Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940 (1987), the California Supreme Court denied review of a California Court of Appeal decision, and the appellants sought review in this Court under section 1257(2). This Court held that it had appellate jurisdiction because the appellants had

"squarely challenged the constitutionality of the [California] Unruh Act, . . . and the [California] Court of Appeal [had] sustained the validity of the statute." *Id.* at 1945 n.3. Section 1257(2) confers jurisdiction " 'when a state court holds [a state statute] applicable to a particular set of acts as against the contention that such application is invalid on federal grounds.' " *Id., quoting Japan Line v. County of Los Angeles,* 99 S.Ct. 1813, 1817 (1979). This Court found, however, that it was without jurisdiction to consider the contention that the California Unruh Act was unconstitutionally vague and overbroad:

> We conclude that these contentions were not properly presented to the state courts. It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." . . . Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the [California] Court of Appeal. The court denied the petition without opinion.

Rotary International, 107 S.Ct. at 1948, *quoting Webb v. Webb,* 101 S.Ct. 1889, 1891-92 (1981). Likewise, here petitioners did not present their federal constitutional challenge until they filed in the Florida Supreme Court their motion to stay issuance of mandate. Appendix D, p. 19a-29a. That court did not consider or rule on petitioners' claim of unconstitutionality, however, as the motion was "moot" due to the court's lack of jurisdiction over the appeal. Appendices A, p. 1a; BB, p. 2a.

In *Perry v. Thomas,* 107 S.Ct. 2520 (1987), the California Supreme Court denied review of a California Court of

Appeal decision, and the appellants obtained review in this Court under section 1257(2). This Court, however, refused to address one of the claims because "[it] was not decided below." *Id.* at 2527 n.9. Likewise, here the validity of article V, section 3(b)(3) was not "decided" below. *Cf. Palmore v. Sidoti,* 104 S.Ct. 1879, 1881 (1984) (After Second District Court of Appeal of Florida affirmed without opinion, "thus denying the Florida Supreme Court jurisdiction to review the case," this Court granted certiorari to review the judgment of the Florida circuit court because it had "raise[d] important federal concerns arising from the [United States] Constitution's commitment to eradicating discrimination based on race"); *Ocala Star-Banner Co. v. Damron,* 91 S.Ct. 628, 631 n.3 (1971) (After Florida Supreme Court denied review of First District Court of Appeal of Florida decision for lack of jurisdiction, this Court "granted certiorari to consider the federal constitutional issues presented . . . since both the trial court . . . and the state appellate court [had] considered and passed upon the constitutional question as though properly raised").

Unlike *Sidoti* and *Damron,* here there is no state trial or appellate court final judgment that raises and passes upon a federal constitutional question. Petitioners had to first present their constitutional challenge in the trial court. *See Davis v. Department of Health & Rehabilitative Services,* 390 So.2d 1194 (Fla. 1980); *Division of Bond Finance v. Smathers,* 337 So.2d 805, 807 (Fla. 1976). Because petitioners did not do this, there is no state court final judgment that draws in question the validity of article V, section 3(b)(3) under the Fourteenth Amendment. Thus, this Court has neither appellate nor certiorari jurisdiction

under section 1257. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645, 1649-50 (1988).

CONCLUSION

The petition for writ of certiorari should be denied.

October 28, 1988.

Respectfully submitted,

H. JACK KLINGENSMITH
Counsel of Record

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APPENDIX AA

MANDATE

From
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STYLE: Consolidated Capitol v. Shea & Gould, et al.
COUNTY: Hillsborough
APPELLATE CASE NO: 86-2100 & 86-2259
TRIAL COURT CASE NO: 82-12358 Div P, 85-12559 Div. J,

This cause having been brought to this Court by appeal and after due consideration, the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this Court and with the rules of procedure and laws of the State of Florida.

Witness, The Honorable Monterey Campbell, Chief Judge of the District Court of Appeal of the State of Florida, Second District, and the seal of the said Court at Lakeland, Florida on this day.

July 8, 1988

/s/ William A. Haddad
William A. Haddad
Clerk, District Court of
Appeal of Florida,
Second District

APPENDIX BB

SID J. WHITE, CLERK
Supreme Court of Florida
SUPREME COURT BUILDING
TALLAHASSEE 32399-1927 July 11, 1988

Lawrence A. Kellogg, Esq.
Bonnie L. Cooper, Esq.
701 Brickell Ave.
Miami, Florida 33131

RE: CONSOLIDATED CAPITAL CORP., ETC., ET AL.
VS.
SHEA AND GOULD, ET AL.

CASE NO. 72,703

I have this date received the below-listed pleadings or documents:

Petition for Review filed with 2nd DCA on 7-7-88 and copy of opinion. DCA CASE NO. 86-2100 and 86-2259

Filing fee – Receipt No. 82997

Motion to Review Denial of Motion to Stay Issuance of Mandate and Motion to Stay Issuance of Mandate is moot as the case will be dismissed.

Please make reference to the case number in all correspondence and pleadings.

SJW/pb

cc: Robin S. Trupp, Esq.
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Hon. William A. Haddad
Clerk, DCA-2

Most cordially,
/s/ Sid J. White
Clerk, Supreme Court